No. .....

United States
Circuit Court of Appeals
For the Ninth Circuit

THE FRANTZ CORPORATION, a Corporation,
Plaintiff in Error,

vs.

E. J. FIFER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Plaintiff in Error.

Filed..... 1923

..... Clerk

United States
Circuit Court of Appeals

For the Ninth Circuit

THE FRANTZ CORPORATION, a Corporation,
Plaintiff in Error,

vs.

E. J. FIFER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT

On June 13th, 1922, E. J. Fifer, defendant in error, filed an action against the Frantz Corporation, plaintiff in error, claiming Ten Thousand ($10,000.00) Dollars damages to his property and business of stock raising and farming on account of claimed trespassing on the part of the Frantz Corporation on grounds which he owned and the Frantz Corporation had leased for oil and gas production. He specified his damages as $2,500.00 per annum for pasturage, $1,200.00 (?) for fences, $4,000.00 for pipe lines, roads, etc., and to his farming and stock raising business $2,500.00. The complaint sets forth as "Exhibit A" the oil and gas lease, under which the corporation had entered upon the

premises. It alleges that the corporation went beyond the rights given in the lease, and that the damages were the results of going beyond these rights. The lease becomes important, but we shall discuss it later in connection with the pleadings.

Issue was joined by answer and reply thereto and trial had on June 24th, 1923 in the District Court of the United States in and for the District of Montana. The trial resulted in a verdict for defendant in error for $3,500.00 damages (Tr. 21). Upon this verdict judgment was duly entered (Tr. 22); petition for new trial was filed (Tr. 23) and thereafter denied (Tr. 159). Petition for Writ of Error (Tr. 160), and assignment of errors (Tr. 161) were filed and order made allowing the Writ (Tr. 169); Bond furnished (Tr. 170) and citations (Tr. 173) and Writ (Tr. 174) issued.

PLEADINGS.

The complaint (Tr. 2) alleges the residence of the parties, the corporate existence of the corporation and the amount in controversy, and that the defendant in error was the owner of the lands in question. These allegations are admitted in the answer. (Tr. 15). It also alleges that the lands referred to consist of about "50 acres of first-class irrigated land, capable of producing large crops of hay and grain; and 30 acres of dry land under cultivation and capable of producing the crops commonly raised in the State of Montana upon lands

of that character and 80 acres of first-class grazing land." (Tr. 3). This is denied in the answer. (Tr. 15). The complaint then alleges "that on the 26th day of September 1919 that the plaintiff and one Frank Frantz entered into a certain oil and gas lease under the terms of which the land described was granted and leased to the said Frank Frantz for the purpose of mining and operating for oil and gas, the laying of pipe-lines and building of tanks, power stations, and structures thereon, to produce, save and take the said products." (Tr. 3). It refers to the lease and sets it forth as "Exhibit A." The answer admits the existence of the lease and the corporation succeeding to the rights and obligations thereunder. The lease (Tr. 8-12) does not differ greatly from the usual oil and gas lease. It is upon a royalty basis with rental obligations when drilling operations are not carried on. It lets the premises "for the sole and only purpose of mining and operating for oil and gas, *laying of pipe-lines, and building tanks, power stations and structures thereon, to produce, save and take care of*" the oil and gas produced. It gave the right to remove machinery and fixtures, including the right to draw casing. It also contained a provision that it was understood and agreed that "all taxes and assessments levied against *said land, or* the production therefrom shall be paid by the respective parties in the proportion of the interest of each in the production from said land, that is one-eighth

(1/8) by the lessor and seven-eighths (7/8) by the lessee." After the printed portion it contained the following clause "Lessee further agrees to pay to the lessor any damages caused to growing crops, fences, or other damages upon said premises, by the lessee or lessee's agent." (Tr. 12). It is upon this portion of the lease the action is predicated.

The complaint goes on (Par. 8 Tr. 4) and alleges that in January 1920 entering upon the authority of the lease the "defendant opened and tore down part of the fences of plaintiff enclosing said lands, established roads over, upon and across said lands, built pipelines thereon, constructed telephone lines, built tanks, power and pumping stations, for the purpose of caring for and handling the production of oil produced upon lands other than those of the plaintiff, and built a water pumping station to supply water for its other operations in the field as well as to other persons." (Tr. 4). That for many years prior to this time (Par. 9) the plaintiff was engaged in the successful and profitable general farming and stock raising business upon the premises. That he had it properly fenced, describing the fence, (Tr. 4-5). These allegations are denied with some qualification in the answer, (Par. 3, Tr. 16), the answer alleging that whatever it did in the way of opening fences, or establishing roads, or building of pipe-lines, was done for the purpose of handling the production of oil produced upon the lands of the plaintiff, and that it was all done to

the benefit of the plaintiff and with his knowledge and consent. It denies that there were any trespassing or acts committed not within the terms of he lease.

The complaint also alleges that in addition to the operations upon the plaintiff's land authorized by the lease the corporation conducted extensive oil and gas operations on land adjoining and in that vicinity and that the operations "so conducted upon plaintiff's said lands were incident to and a part of defendant's general operations," and in the conduct of its general operations the corporation made use of its right to enter upon the lands in question (Par. 10 Tr. 5). This allegation is admitted in the answer with allegations of lease authority so to do. (Tr. 15.) The complaint then alleges that by reason of the breaking down of the fences and the opening up of the roads the protection of the premises against "range cattle and stock was wholly destroyed, and such animals ate up and destroyed the grasses, growing crops and vegetables, depriving the plaintiff of the use of his lands for farming and stock raising purposes," so that he was compelled to abandon them in the spring of 1920, and he has since abandoned them, save and except that in 1920 he cut a partial crop of hay consisting of about 45 tons off of a portion of the lands (Par. 11, Tr. 5-6). The damages are then itemized (we do not vouch for the mathematics), specifying $2,-500.00 per annum for pasturage, $1,200.00 for

fences, $4,000.00 for pipe-lines, telephone lines, tanks, power stations and other structures and roads on the lands and $2,500.00 for the damage to the business of farming and stock raising, then alleging a total of $10,000.00. (Par. 12, Tr. 6.) This allegation is specifically denied in the answer (Tr. 17). The answer further alleges another action pending between the same parties covering the same subject matter in the State Court of Montana in Fergus County (Tr. 17). It might be noted that this plea was practically abandoned. To this plea reply was filed by the plaintiff denying it. Upon these pleadings issue was joined and trial had.

EVIDENCE.

In Fergus County, Montana, in 1919 there was discovered a new field known as the Cat Creek Oil Field. The field is 25 or 30 miles from the nearest railroad station of Winnett. One of the first discoveries in the field was made by the plaintiff in error here upon the lands here in question. The defendant in error was the owner of about 160 acres of land as a ranch. He entered it some years ago and obtained his patent prior to the lease here in question. The corporation came out upon the lands in October 1919. At the time they came there the lands were enclosed by a fence. A road ran north of the property and then down through to the south in the vicinity of the ranch house of the owner,

and this road was used in the early development (Tr. 90).

The oil development consisted of drilling a well on the Charles tract just south and drilling of the Fifer No. 1 on the land in question. There is no dispute that in the early development there was no breaking down of fences or general use of this road. There was also a road which came in from the northwest and crossed the lands in question running diagonally from the northwest to the southeast. On the tract itself this road had two branches, one going northerly to the Fifer No. 2 and the Montacal Wells (Montacal being a sublease under the lease here in question), and one road going southwesterly and on off of the property.

The testimony is undisputed that the roadway the corporation used, to-wit, the one from northwest "was used all the time we were working, and I drove over the trail once before we started in company with Mr. Leavitt. The gates at either end of this field were kept closed, so far as the Frantz Corporation and its operations were concerned, *until the stampede came.* When that happened they were down. There were a large number of operators and a large number of people going through." (Tr. 95.) In other words what happened was there came the to be expected stampede with the discovery of oil in a new field. It is also undisputed that after the stampede came the fences in the vicinity

of the entrances to the land were broken down and destroyed. The exact extent of the breaking down and the destruction is susceptible of exact calculation and measurements by reason of the fact that the map "Exhibit 5" is not questioned or disputed as to its accuracy in showing this. The roads were new and largely cattle trails, so that as they became muddy or impassable for other reasons teams of the corporation or its contractors, and the teams of others (approximately nine other operators Tr. 115) would swing in and out from the regular road and in doing so widened the break in the fences. The operations became so extensive that this northwest to southwest highway was built up for a main travelled highway, and has been since maintained as such. There is some proof in the record that it was a highway before, but upon this there is a disputed question of fact.

In the development of the field it became necessary to have water. Pipe lines were accordingly laid from lands leased by the corporation on the south and conveyed in, on and to the Fifer land. It also became necessary and incident to the development to have telephone lines. These were installed on the land as required.

In order to convey the oil out it was necessary to first assemble the oil from the different wells to a central plant, and then from this plant pump it to the railroad station at Winnett. These assembling lines were by gravity. The oil was assembled

on the Fifer tract. The pumping lines were by force. A pumping station was located on the Fifer land to pump on out to Winnett. All this is shown on "Exhibit 5." It is true that there was a water line going from the outside in to the Fifer tract, but the testimony shows this would be necessary for the Fifer development. It may or may not be true that there were water lines going from the Fifer tract out, but there is no direct proof upon this as a separate element of damage.

Unquestionably and beyond dispute this main road was used to haul materials to other developments, but not until it had first been used in the Fifer development. The testimony is undisputed that the fences were kept up until the stampede came and equally undisputed that after the stampede came the general use by the public made it impossible to keep them up.

The pumping plant of the corporation erected upon the lands in question was a combination plant where water and oil were pumped in the same station. It was thus installed for reason of economy and efficient operation. Water lines were all buried beneath the surface; the oil lines and telephone lines are above the surface. These all show on the may "Exhibit 5."

It is undisputed that this equipment of pumping station for water and oil and these lines for conveying water and oil, or at least the trunk lines, were used for the conveying of the oil and water

incident to the corporation's development on adjaecnt lands (however it must be noted that the so-called camp of the corporation was not located upon the lands in question. That was to the south).

As to the character of these pumping stations and pipe lines, and telephone lines, their construction, size and use, the testimony is undisputed. The defendant in error offered no evidence here whatever, so we are confined to an examination of the testimony of witnesses Landz (Tr. 89) and Sontag (Tr. 105).

From these two witnesses' testimony it is found that "the pumping station and power house were an essential part of the development on the Fifer lease, if we had no other (lease) it would be necessary to the taking oil out and getting it to the delivery point, and the same would be true of the water lines with this respect, we could have put in a different system * * * , but the size of the line would have been the same, (Tr. 94, l. 30), and "assuming that we had but the one lease (Fifer) and eliminating the Brown and Charles and the other it would have been necessary for us to have installed the pump to have handled the Fifer in the manner we did." (Tr. 93, l. 6). "The oil lines are laid on the surface and they would be just the same relative to Fifer whether we had Fifer alone, or O'Neil, Brown and Charles (oil) in them." Tr. 93, l. 24.)

"I think this power station would have been con-

structed for the purpose of taking care of the Fifer production * * *. I think we would have constructed this pumping station for the production of the Fifer lands along. IT WOULD TAKE JUST AS LARGE A STATION TO PUMP 100 BARRELS A DAY AS IT WOULD TO PUMP A THOUSAND BARRELS A DAY." (Tr. 102, l. 2-7.)

"These oil lines that were put in to handle the Fifer production were not increased * * *. They would be identical for handling the Fifer production as though they handled several places in that vicinity." (Tr. 113, l. 1.) A pumping operation was necessary in the Fifer tract to get the oil produced from the Fifer tract to market. THE PUMP INSTALLED WAS THE SIZE NECESSARY FOR THE HANDLING OF THE FIFER PRODUCTION AS IT CAME TO US, * * *. The telephone was necessary for the handling of the Fifer production, if we had had no other." (Tr. 113, l. 10.)

This testimony is undisputed. The installation of pumping plant for water and oil, pipe lines for water and oil, and telephone, while all used for and in connection with other production, is identical with what was contemplated or would be necessary had it been for the Fifer lease alone. It is also undisputed that one road, to-wit, one to the north and to the so called Montacal property was used exclusively for Fifer land operations; also

that all of the materials used for the pumping stations, pipe lines, etc. necessary to the Fifer development are the materials that were hauled in over the roads in question; also that there were a number of other operators in the field (Tr. 114, l. 31), and that the roads in question were used by other operators and by the public generally in the stampede. (Tr. 95, l. 19.)

The defendant in error by himself and some neighbors offered testimony as to the character of the land in question, its value as a ranch, and its productiveness for alfalfa and other purposes, and the value of its production and pasturage, and the value of the fences. (Tr. 33, Tr. 62, Tr. 71.)

Upon this phase of the case plaintiff in error offered the testimony of an older timer of that country, Mr. Hilger, (Tr. 124) and a well known real estate man, Mr. Downing. (Tr. 134.) It also offered photographs showing the land in question and conditions generally, and in addition to this the legend of the map as to the character of the land is undisputed and the map was admitted without objection. (Tr. 83.) Of course, upon this issue as to value of land, its pasturage, value of crops produced, and cost of construction of fences, etc. we assume this court will doubtless be confronted with the decision of the jury upon a disputed fact issue.

ASSIGNMENTS OF ERROR.

(Tr. 161.)

The plaintiff's in error assignment of errors will, of course, be found in the transcript but for the sake of convenience we repeat them here. They are:

I.

That upon the trial of said cause the verdict of the jury rendered therein is excessive and appears to have been given under the influence of passion and prejudice. (Tr. 24.)

II.

That the evidence is insufficient to justify the verdict rendered and judgment entered thereon, or any verdict or judgment herein, among others in the following particulars:

a. It appears from the evidence submitted in the case that the defendant's right of entry upon said premises was under written contract, or agreement, and that all of the damages claimed by the plaintiff, and to which evidence was offered was due to and proximately caused by causes that were expressly relieved and excused from by the agreement of the parties.

b. From all of the evidence introduced upon the trial of this case it appears that the injuries, if any, that the plaintiff sustained to his land and premises were due to and proximately caused by causes, some of which were from defendant's ac-

tion, some of which were by the action of others, and most of which were by action on the part of the defendant, damages for which had been expressly waived by the plaintiff by the lease agreement existing between the parties. From the evidence it cannot be ascertained whether or not the damage was due to causes for which the defendant might be responsible, or causes for which he would not be responsible, and there is such a confusion in evidence that it would seem insufficient or lack of proof on the part of the plaintiff and failure to prove his case as laid.

c. The evidence is wholly insufficient to sustain a verdict in the amount awarded by the jury, in that there is no proof to justify such a sum in damages. (Tr. 245.)

III.

Errors at law occuring at the trial, which said errors at law are as follows:

a. The Court erred in permitting testimony to be introduced with a view to showing damages as to the structures, to wit, pumping plant, pipe-lines, water-lines, and telephone lines upon the premises, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

b. The Court erred in permitting testimony to be introduced relative to roads built upon said premises, or used thereon upon the ground and for

the reason that the building and use of roads upon said premises was authorized by the lease agreement between the parties and a necessary incident thereto, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

c. The Court erred in refusing to strike out the witness' answer to the following question:

> "Q. What was the value of your entire tract of land prior to the entry by the Frantz Corporation?
>
> "A. I have been offered seventy-five dollars an acre for it all the way through." (Tr. pp. 51-52.)

d. The Court erred in permitting testimony relative to the damages by loss of crop of sweet clover, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

e. The Court erred in permitting witness, Al. Dixon, to answer the following question:

> "Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?" (Tr. pp. 67-68.)

f. The Court erred in refusing to allow the witness, Landz, to testify as to what road was first used when the oil development first started, and in sustaining the plaintiff's objection to that testimony. (Tr. p. 26.)

g. The Court erred in sustaining the plaintiff's objectio nto the following question asked of witness Landz:

> "Q. Now, this hauling in, was that done by contract on a per pound basis, or did you do the hauling yourself?" (Tr. p. 104.)

h. The Court erred in permitting the following question to be answered by the witness Sonntag:

> "Q. What was the cost of that pumping station?" (Tr. 118.)

i. The Court erred in permitting the following question to be answered by the witness Sonntag:

> "Q. How many wells have been drilled across the river by the Frantz Corporation where the road through the Fifer tract was used in the hauling of material?" (Tr. 119.)

j. The Court erred in sustaining plaintiff's objection to the following question asked the witness Sonntag:

> "Q. Have you had occasion to rent the surface-right privilege for use similar to what you have here under substantially similar conditions as are in existence on the Fifter tract?" (Tr. 122.)

and in sustaining plaintiff's objection to the following question asked the same witness:

> "Q. From your experience, operating under conditions similar to those on the

> Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?" (Tr. 122.)

and the Court erred in sustaining the plaintiff's objection to the defendant's written offer of proof which is in words and figures as follows, to wit:

> "We offer to prove by the witness on the stand, L. F. Sonntag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Frantz Corporation is making of the lands here in controversy, and that a reasonable rental value of such lands for the purposes such as the Frantz Corporation is making of these lands is One Hundred Dollars per year.
>
> "Mr. Ford—To which plaintiff objects on the ground that the witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.
>
> "THE COURT—The offer is denied

and exception may be noted." (Tr. 123.)

k. The Court erred in sustaining plaintiff's objection to the question asked of the witness Hilger relative to the value of the alfalfa hay in Fergus County, Montana, during the years 1920, 1921 and 1922. (Tr. 132.)

l. The Court erred in sustaining plaintiff's objection to the following question asked of the witness Downing:

> "Q. From your knowledge and from the number of visits you have made there, are these assumptions real or mythical, as given you by Mr. Ford?" (Tr. 139, l. 5.)

IV.

The Court erred in refusing defendant's motion for directed verdict.

V.

The Court erred in its instructions to the jury in such portions of the instructions as exception was taken to by the defendant, which objections and exceptions are as follows:

Are there any exceptions for the plaintiff?

> "MR. FORD. No exceptions.
>
> "THE COURT. Any for the defendant?
>
> "MR. BROWN. Defendant excepts to

that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

"We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

"We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

"We object to the considerationby the Court in its instructions of the damage to the fences in toto as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to fences from other outside or independent operators, and the jury are entitled to consider whether or not this was from this defendant or was from trespassers, and except to the Court's instruction to

fix responsibility entirely upon the defendant and no other.

"THE COURT. Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction of the fence so far as he destroyed it.

"MR. BROWN. I did not mean to misquote. What I mean is the question of confusion as to who caused it.

"THE COURT. Yes, proceed.

"MR. BROWN. And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or possibly upon it, for the reason that there is confusion upon the issue and no sufficient proof on which the cause should be submitted to the jury.

"The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land

and also a general loss and destruction of its appurtenances; that there can be but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case." (Tr. 154, l. 6.)

VI.

The Court erred in denying the defendant's petition for new trial.

ARGUMENT.

The issues in the case at bar—when limited to oil and gas leases—are rather new. It has been difficult to find "pat" citations where similar facts have been before appellate courts.

We have here a lease that expressly provides for the entry upon the lands in question for the purpose which it was entered upon and used for. Expressly providing for "mining and *operating* for oil," also for the laying of pipe-lines, building tanks, power stations, and structures "*thereon.*" In the face of which express permission and such express purpose and object of the contract a suit is brought and *evidence* admitted of these very items, even their costs to the *Lessee* (Tr. 118) as elements of damages for the jury to consider. There is not one bit of proof in this case of anything being done by the plaintiff in error that was not either actually per-

mitted by the lease or clearly within the plain implication and intendment of such a contract or lease.

Later we shall, in order to avoid any question of abandonment of Assignments of Error, take up some of the assignments in detail. At the outset of the argument we would like to discuss this lease and the legal rules applicable to it. Such discussion necessarily involves Assignments of Error No. I, II, III-a-b-h-i, IV and portions of V.

An examination of counsels statement (Tr. 47, P. 1) the complaint and particularly of Paragraph 7 thereof (Tr. 3-4) and the oil lease here under discussion discloses that the action is sought to be maintained under the last clause of the lease which provides:

> "Lessee further agrees to pay to the lessor any damages caused to growing crops, fences or other damages upon said premises by the lessee or the lessee's agent." (Tr. 12.)

Now it will be urged that an oil lease is to be strictly construed (contra to the general rule) against the lessee. We have examined with interest the cases holding to this rule of construction of oil leases and have found that without exception this rule has been adopted only as to production.

> "Such leases being construed m o s t strongly against the lessee and in favor of

the lessor, *owing* to the peculiar *nature of the mineral and the danger of loss to the owner from drainage by surrounding wells.*"

Huggins v. Daly, 99 Fed. 606;
Riles v. Gulf Etc. Co. (La.) 62 So. 623;
Superior Oil Etc. Co. v. Mehlin (Okla.) 108 Pac. 545;
Frank Oil Co. v. Belleview Etc. Co. (Okla.) 119 Pac. 260.

Now, it is axiomatic that where the reason for the rule ceases the rule ceases.

Sec. 8739 Montana Revised Codes.

In this cause we have nothing involving the "peculiar nature of the mineral," or its "danger of loss," or its production involved. This is a straight action for damages to fences, lands, the business of farming, involving the use of property. Nothing peculiar about that to take it out of the recognized and approved rules of construction. It is unquestionably a case of ambiguity as between intent of a contract and specific terms and seeming conflict between terms within the contract. The ambiguity of the contract arising solely out of a clause *for the benefit of the lessor*—hence unquestionably by him.

"In cases of uncertainty not removed by the preceding rules the language of the contract should be interpreted most

strongly *against the party who caused the uncertainty to exist* * * * ."

Sec. 7545 Mont. Rev. Codes.

It might also be noted that the Montana Code provides for "all contracts" to be interpreted in the same manner. There is therefore no exception as to oil leases in Montana.

Sec. 7526 Mont. Rev. Codes.

Since this case and this lease have nothing about them requiring any exception to the rules of construction we would ask leave to apply them.

The Montana rules of construction are:

"Particular clauses in a contract are subordinate to its *general intent.*'

Sec. 7541 Mont. Rev. Codes.

"Repugnancies in a contract must be reconciled if possible by such an interpretation as will give some effect to the repugnant clauses, *subordinate to the general intent and purpose of the whole contract.*"

Sec. 7543 Mont. Rev. Codes.

"Words in a contract which are wholly *inconsistent with* its nature *or the main intention* of the parties are to be rejected."

Sec. 7544 Mont. Rev. Codes.

"A contract must receive such an interpretation as will make it lawful, operative, definite, *reasonable* and capable of being carried into effect, if it can be done without violating the intention of the parties."

Sec. 7534 Mont. Rev. Codes.

"Interpretation must be reasonable."

Sec. 8771 Mont. Rev. Codes.

"One who grants a thing is presumed to grant also whatever is essential to its use."

Sec. 8751 Mont. Rev. Codes.

The plain purpose, object and intent of the lease was to secure, produce and market mineral oil from these lands. Now, the usages of the business are commonly known and were known to the parties to this lease.

"When oil or gas is found in paying quantities it is not usual to consume it or reduce it to use at the wells, but it is conducted in iron pipes to large tanks or reservoirs, whence it is distributed by other pipes to the places of consumption, often many miles distant.

"These are matters within the common experience or nowledge of all men living

> in those portions of the country where oil and gas are produced, and courts will take notice of whatever ought to be generally known within the limits of their jurisdiction."

Brown v. Shipman, 155 U. S. 665 at 670.

> "Even if the language of the agreement were doubtful and susceptible of two constructions, it would be our duty to give it that construction which would make it fair and such as prudent men would naturally execute in preference to one that would make it inequitable or such as reasonable men would not be likely to enter into."

Withington v. Gypsy Oil Co. (Okla.) 172 Pac. 637;
Citing cases.

It is also a matter of both common knowledge and legal right that the right of ingress and egress goes with a lease, or license privilege, of land for mineral development purposes. Also that the appurtenances or machinery necessary to the development or the handling of the product must be located upon the land. Must occupy (trespass?) it. This of course goes to the general law of contract and the hiring of real property, but it is also peculiarly applicable here. The question of what is intended or implied in an oil and gas lease has most fre-

quently come up in suits to obtain or resist a forfeiture, usually for failure to use due diligence. So we use a case upon those facts. Of course the rule would be the same. A comparatively early and rather prominent case upon this is from the Court of Appeals of the Eight Circuit. In the consideration of the question of interpretation of an oil and gas lease the court said:

> "Whatever is implied in a contract is as effectual as what is expressed. Implication is but another name for intention, and if it arises from the language of the contract when considered in its entirety, and is not gathered from the mere expectations of one or both of the parties, it is controlling. * * *
>
> "The subject was, therefore, rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. * * *
>
> "Whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified."

Brewster v. Lanyon Zinc So.
140 Fed.—801 at 809-10-11.

In this case we believe practically all the injury to the land was within the plain intent of the contract and the Court erred in permitting testimony as to the improvements (Assignments No. II and No. III a-b-h) and in its instruction in this regard (Assignment No. V.)

The only testimony in the case upon the question of the necessity of the use of the land by these improvements—or to put it another way the extent of the use by buildings, pipe-lines, etc., was from the witnesses Landz (Tr. 89) and Sontag (Tr. 105). As to the pumping of water and oil, also the pipelines and telephone these witnesses say:

> "It was necessary to pump water in the Fifer tract to develop the Montacal (a Fifer area) and Fifer wells. * * * It was necessary to bring the water to the Fifer tract for this development."

(Witness Landz Tr. 92, l. 26-30.)

Witness Sontag goes into a more elaborate discussion of the use of water in drilling and later in the production of oil wells. He also explains the necessity and common practice of installing the oil and water pumps in the same building (Tr. 107). Testifies that all these water lines are underground (Tr. 108, l. 15.)

Next the pump house—

Upon this the Court permitted (over objection) evidence to be offered of the character of the foundation (cement Tr. 45, l. 13) and the *cost* thereof (Tr. 118, l. 15.) These two witnesses—(as we before stated the only evidence upon the subject)—both testify that the pump house was necessary to both drilling and pumping production, and that the two pumps in one building made for economy and of course reduced the extent of the trespass (?).

> "I think this pumping station would have been constructed for the purpose of taking care of the Fifer production. * * * I think we would have constructed this pumping station for the production of the *Fifer wells alone.*"
>
> X Exam. Landz Tr. 102, l. 2 and 7.)

> "The pumping station and power house was an essential part of the development on the Fifer lease, if we had had no other and (it?) would be necessary to the taking of the oil out * * * and the same would be true of the water lines * * * (could have put in a different system)—the size of the line would be the same."
>
> (Landz Tr. 94, l. 21.)

> "In the development of the drilling, carrying in supplies * * * taking oil

from them it was again the development of the Fifer lease."

(Tr. 97, l. 6.)

The pumping of the water and oil are the same.

"Exactly same equipment."

(Tr. 102, l. 15.)

Says the witness Sontag—Landz successor in the field:

"These oil lines that were put in to handle the Fifer production were not increased. (Tr. 113, l. 1.) They would be identical for handling the Fifer production as though they handled several places in that vicinity. There is no increase in the character of the trespass. (Tr. 113, l. 5.) The pump installed was the size necessary for the handling of the Fifer production as it come to us. (Tr. 113, l. 12.) The telephone was necessary for handling the Fifer production if we had had no other (Tr. 113, l. 29.)

"With reference to the use of this pumping station, I would have put in a pumping station of the size and capacity there to take care of the production of the Fifer tract, and I would have put in that pumping station to take care of the 45 or 50 barrel production of the Fifer No. 1." (Tr. 118, l. 5 to 10.)

This is absolutely all the testimony there is on this branch of the case. No testimony whatever that these pipe-lines were increased to handle other production; that this pumping station was of excess size. Nothing whatever to show that the damage was increased by virtue of this additional use. If counsel in response to the repeated objections had promised to connect it up with proof that it made an additional burden or trespass it might have been proper to admit it subject to a motion to strike. But such is not the case. The court even went further—included it in his instructions. All this must have had its effect upon the jury and we believe it did. In light of the fact that the testimony of these two witnesses is the only evidence in the case upon this branch of it that issue should have been withdrawn from consideration by the jury.

At the outset of the trial we believe the Court announced the correct rule. We were never quite clear on what caused the court to modify its position or rather erroneously extend it. The Court's original position can best be given by quoting from the transcript.

> "THE WITNESS. The Frantz Corporation also placed upon the property five or six tanks, storage tanks. There have also been built three pipe-lines in and upon the property.
>
> "THE COURT. The lease provides for this.

"MR. FORD. Yes, but it also provides for any damage done, that they will pay any damage done to growing crops, fences or any other damages.

"THE COURT. How can you call it a damage when the contract calls for them to do that, both parties; that is, if they were built for this land?

"MR. FORD. We will show they were used in connection with their general operations on other lands.

"THE COURT. Can you make any showing that they were built for use in connection with this land?

"MR. FORD. In connection with this land?

"*THE COURT. Can you show a segregation of damages because they were used in connection with other land?*

"MR. FORD. Possibly not, but the position we take is that they had a right to go in and build these power-lines or tanks or any other work necessary in connection with their operations, they had that right, but they have stipulated that whatever the damage is that they will pay for.

"THE COURT. Yes, growing crops, fences and other damages. I doubt if you can find any authority, in view of the contract, in the operation of mining or

leasing of your premises, so far as the soil is concerned, that any of these necessary operations would be considered a damage. You might as well sink a score of wells and say he is damaged in the piles of slush thrown out, and in mining the tunnels run. Have you any authority to sustain you?

"MR. FORD. So far we have not. This is a peculiar lease because of the written portion contained in here, if the Court will examine the lease; it is a printed lease, but this clause is written in, the parties having contracted to pay the damage. I am frank to say we can find no authority.

"THE COURT. When we see some of these papers come into Court, we are frank to say we don't see how they can do business without a guardian.

"MR. FORD. But a lease of this character is strictly construed against the lessee and in favor of the lessor, and the lessee having contracted to pay any damage, it is not limited, it is unlimited, to pay plaintiff damages that resulted.

"THE COURT. Well, I will hold that any damage like to the crops or fences that these parties would do in carrying on their legitimate operations would of

course be within that term of the lease I think, but damage would accrue by reason of their sinking a well or placing a pipe-line to convey the oil or water for the benefit of both parties, the injury that would do wouldn't be called damages. I can't understand any principal of law that would call that a damage; if it is a damage it is without injury, because it is the very thing you contemplate shall be done; they might carry on their operations, such as they have bound themselves to do by this lease, without doing any damage to crops or to fences if they were careful enough, and hence not necessary, but these *things that they must necessarily do, like placing your pipe-line, sinking your well, pumping, I don't think that even this lease, as crudely drawn, would consider that a damage.* Certainly parties acting together wouldn't call that a damage to the land; no, that is the very thing they were going to do to pour wealth into the pockets of both of them. I think I would place that construction on it, in the absence of any authority from the standpoint of principle and reason; but if they have placed on there instrumentalities that are not for this particular land, to carry out this particular lease, seeking to make it the base

> of operations for their other surrounding lands, that were not contemplated by the parties, I think you might show it; it will be a matter to be shown to the jury; make the best proof of any damage on that that you can and it will be for the jury to determine to the best of their judgment whether it is in fact a damage in the sense of the word. I think you may show the entire situation as far as you think it necessary." (Tr. p. 46 line 13, pp. 47, 48 to line 3 p. 49.)

It seems almost impossible that after this statement the court would as it did permit testimony of the cement construction of the building and its cost. The court went beyond its first position and we think was clearly in error in permitting this objectionable testimony and in not peremptorily taking these issues from the jury.

We believe and urge upon this appeal that the true rule in this case (particularly since the ambiguity comes from the lessor) is that first indicated by the court—to-wit, that the burden of proof was and is upon the lessor to show (1) what damage comes within this last clause of the lease and (2) segregate it from other damage which was clearly contemplated and by the fact of the lease cosented to. This they did not do. The only testimony upon the subject is that offered by the leasee

which stands uncontradicted that the uses of the surface were only such as were necessary for the Fifer production. There is no testimony whatever that these *structures* destroyed crops or fences. As to the other element of damage the fences and the stock going upon the crops—the rule cast the burden of proof upon the lessor to show what of this was from causes not contemplated or not excused from and within the ambiguity which he himself had created.

The lease is to be construed most strongly against the lessor, and in favor of the lessee.

Chamberlain v. Brown (Ia.) 120 N.W. 334;
Cohen v. Newman 158 N. Y. S 1111;
Conneau Lake Ice Co. v. Quigley (Pa.) 74 Atl. 648.

As heretofore indicated there is nothing in this suit that entitles this lease to the benefit of the exception as to the rules of construction of contracts. *Accordingly we assert that the lease itself is a grant of an estate.* Since no right of farming, etc. was reserved, (or could be as against necessary development for oil) no damage can be claimed with the possible exception of damages, if any, occasioned at the time of entry or up until the estate became finally fixed by the discovery of oil (May or June, 1921, Tr. 100, L 16).

The question of the character of oil leases has been frequently before the courts. Whether they are grants of a stratum of earth—bills of sale of certain personalty when taken and removed from the earth, or a license or permit to go upon lands for the purposes contemplated is a question of construction of the particular lease in question. To construe a lease contract in Montana we again turn to the Montana Codes:

> "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided in this code."
>
> Sec. 7626 Mont. Revised Codes.

No exception exists in Montana as to oil leases. The general rules of construction we have heretofore given apply. We then come to consider this lease and the meaning of its use of the terms

> "Grant, demise, lease and let".
>
> (Tr. 2 L. 18.)

and the past tense

> "has granted, demised, leased and let."
>
> (Tr. 8 L. 19.)

and the provision that the same shall extend to

> "their heirs, executors, administrators, successors, or assigns."
>
> (Tr. 11 L. 20.)
>
> "Grants are to be interpreted in like manner with contracts in general, except

so far as is otherwise provided provided in this chapter."

Sec. 6869, Mont. Revised Codes.

"A grant is to be interpreted in favor of the grantee * * *."

Sec. 6852, Mont. Revised Codes.

"The transfer of a thing transfers also all its incidents, *unless expressly excepted* * * *."

Sec. 6857, Mont. Revised Codes.

"One who grants a thing is presumed to grant also whatever is essential to its use."

Sec. 8751, Mont. Revised Codes.

We do not insist that this property was let for any other purpose than that of drilling for oil. *But there were no reservations of any uses thereof by the lessor.* Hence no damage could accrue to something he did not reserve. A great many leases are found where the farming right was reserved, or certain acreage was to not have its surface disturbed by drilling, tanks, etc. But these were express exceptions to avoid the law that the transfer of the thing carries all the incidents. This grant was absolute in form for the purpose indicated. As against those purposes, no reservations for farming, for ground not used for roads,

of right to plant some particular crop, were made. Within the terms of the agreement it was an estate, yes in fee so long as oil and gas should be found.

Graciosa Oil Co. v. St. Barbara Co. (Cal.) 20 L. R. A. N. S. 211;
Guffery v. Smith 237 U. S. 101;
Walford Oil etc. Co. v. Shipman (Ill.) 84 N. E. 53;
People v. Bell (Ill.) 19 L. R. A. N. S. 746;
Lowther Oil Co. v. Miller-Sibley Oil Co. (W. Va.) 44 S.E. 433;
So. Penn Oil Co. v. Snodgrass (W. Va.) 76 S. E. 961.

There is nothing in the lease to indicate an intention to reserve the surface. On the contra the lease evinces an intention otherwise.

Where reservations are contemplated by the parties it is the common practice to mention them —such as right to farm the surface, or a proviso for burying pipe-lines, or other similar direction which indicate that the surface shall not be interferred with.

Also we frequently find a reservation that there is a certain acreage upon which there is not to be any drilling or buildings, but even such as this latter is subservient to the dominant estate.

Lynch v. Burford (Pa.) 50 Atl. 266.

Reservations are also found providing for no drilling within a certain distance of buildings, or structures of the lessor, or providing the entry of roads, material, etc. shall be on a certain road. No such reservations are found here.

On the contra the lease discloses a different intent. The contingency which vested the estate of the lease happened—oil was discovered and his interest in real estate became fixed.

> Rauling v. Armel (Kan.) 79 Pac. 683;

His rights became vested rights.

> Dieley v. Coffeyville Etc. Co. (Kan.) 76 Pac. 398.

The lease recognizes the change of title (without reservation of surface) when this contingency of oil discovery happened and provides:

> "It is understood and agreed that *all* taxes and assessments levied against *said land or the production* (note both land and production) therefrom shall be paid by the respective parties *in proportion of the interest* of each, in the production from said land, that is one-eighth (1/8) by the lessor and *seven-eighths* (7/8) by the lessee. (Tr. 10-11.)

Again frequently oil leases provide for the lessor to have free gas about his buildings or oil as he may require for his uses. No such provisions are

here found. There is not one paragraph in this lease which can be said to indicate an intention to reserve any estate, or privilege, in the surface of this land after the discovery of oil by the lessee. Not even a clause to the effect that he has the right to reside thereon. In fact as lessor says about his leaving:

> "I sold my stuff until further operations, until they either got out of there so that I could start again and *start in new if they didn't make a success.*"

Pregnant with the suggestion that if they did get oil he knew he would never come back.

This being the dominant estate the inferior estate cannot be asserted against it. Particularly is this true because of no reservations, clear intent of the parties, and the statutory rules of construction. Also the granting words created an estate in effect in fee.

The pipe-lines, telephone lines, power station, etc. were clearly cases of damnum absque injuria.

The roads were incidents of ingress and egress with the lease. Implied covenants they have been called.

Knoths v. McGregor (W. Va.) 35 S. E. 899;

Essentials to its use and enjoyment.

Sec. 8751 Mont. Revised Codes.

Upon the question of the roads the testimony is clear (except possibly the road to the southwest) that these roads were originally used for this development. True they later passed over them to get to the camp and possibly (upon conflicting testimony) other operations, but the road was there from and for the Fifer operations. Prior to this time the road was used by the house. (Tr. 90, l. 16.) The trespass(?) was not added to by other uses. It must be admitted that with the renting of land the right of passage way over for the business contemplated goes with the lease.

Sec. 8751, *supra.*

There are not a great many cases upon the subject of roadways as applied to oil leases. In one case the right is clearly recognized although the decision is based upon another point in the case.

Coffindaffer v. Hope Etc. Co. (W. Va.)
81 S. E. 966, 52 L. R. A. N. S. 473.

However, the question has come up in a great many cases of mining operations and the right to passage way—also the right to transport coal *from other properties* over the way in question has been repeatedly recognized.

New York Etc. Co. v. Hillside Etc. Co.
(Pa.) 74 Atl. 26;
Con. Coal Co. v. Schnisseur (Ill.) 25 N.
E. 795;

Schobert v. Pittsburgh Etc. Co. (Ohio) 80 N. E. 6;
Lillibridge v. Lakenanna Coal Co. (Pa.) 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627;
Schobert v. Pittsburgh Etc. Co. (Ill.) 98 N. E. 945, 40 L. R. A., N. S. 826.

The structures contemplated by the lease and the rights of way incident to the operations contemplated were all matters for which the plaintiff should not be entitled to recover any damages, and upon which no proof should have been permitted. We believe the court was clearly in error in not sustaining our objections to this proof and in submitting these issues to the jury at all. The evidence must be presumed to have created prejudice in the minds of the jury. It was error to receive it. It was error to have it submitted in instructions.

The only issue upon which there could be any serious difference of opinion is the question of damages to the fences and possible damage to the crop up to the time the estate was created, or in excess of territory actually needed and used for the development. Upon this phase of the case, even though for the sake of argument only, we yield the point that damages might be claimed, under this lease, we do not believe the testimony offered was sufficient to meet the rules as to burden of proof and to entitle the case to go to the jury. The lessee be-

ing upon and in possession of the premises under rightful authority in the first instance cannot be held as a willful trespasser. His responsibility is for his negligent acts. Before he can be held for these the lessor must prove, as the court indicated in his comments, (Tr. 46, l. 29) what portion of his damages are damages for which the lessee would be responsible, and secondly, since the record is undisputed that others went across and over his land, what portion of the damage was due to the acts of the lessee alone. In other words, if there was a confusion of causes of damage, plaintiff has not sustained the rule of burden of proof sufficient to entitle his case to be submitted to the jury in this case by the bare proof of the lessee having committed certain acts. The testimony is undisputed that there was a stampede. That these roads were used by a number of people; that there were several outfits drilling in that vicinity and used these roads; also undisputed that when they first began their operations they kept the gates closed. (Tr. 95, l. 17). With this confusion of causes producing damage the burden was upon the lessor to show; First, that within these causes there were some that were not damnum absque injuria, that he could recover for; that the causes of his damage were causes for which he had the right to hold the lessee in damages. Certainly the testimony here shows a general stampede; a number of people going across these lands and their fences. No where in the evi-

dence does Fifer show the trespass as being independently and alone from the lessee. The cause of the damage as to whether it was the corporation's acts or acts of strangers is a matter of speculation. This we urge does not satisfy the ruule as to burden of proof, particularly since the lessee's original entry was lawful and the acts must be proven to have been negligently done.

> "No cause should be withdrawn from a jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish. However, under this rule, the record must contain competent testimony f a i r l y tending to affirmatively prove the allegations of the complaint. The burden of proof is still upon the plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory inconsistent therewith, it then becomes a mere conjecture, and the rule of the burden of proo fis not satisfied. (Shaw v. New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515) Slater's testimony as to ownership is entirely circumstantial,

and while, of course, these allegations can be proved in that way, yet such proof must be measured by the rules applicable in such cases. It must not be susceptible to a n y other equally reasonable inference than that which may be drawn in favor of the plaintiff. *In fact, it must tend to exclude all other inferences.* On the other hand, if it is susceptible to any other equally reasonable inference, the proof then fails, and, measuring the proof here by this standard, it certainly falls short of 'fairly tending to affirmatively prove' the allegations of plaintiff's complaint."

Park v. Grady, 62 Mont. 246 at 252.

"Actionable negligence may be shown by circumstantial evidence, but the circumstances must tend directly to establish the cause of action. The burden of proof is upon the plaintiff, and is not satisfied if the conclusion rests merely upon conjecture or speculation, or if the facts and circumstances have an equal or stronger tendency to support some other theory inconsistent with the one upon which plaintiff relies."

Fusselman v. Yellowstone Valley Etc. Co.
53 Mont. 254 at 266.

"Under this rule, however, the record must contain competent testimony fairly tending to affirmatively prove the allegations of the complaint. The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. Thus, in an ordinary case of negligence, like the one under consideration, plaintiff has the burden of proving the negligence of defendant as alleged, and also that such negligence of defendant, or that such negligence was the proximate cause of the injury, to conjecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven, it does not tend to prove them, within the meaning of the rule above announced. The use of the word 'tend' does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the com-

plaint, and not some other theory inconsistent therewith."

Shaw v. New Year Gold Mines Co. 31 Mont. 138 at 146.

"When the evidence is in this condition, it will not support a recovery. The burden is upon him who alleges negligence to prove it by substantial evidence; and this burden is not sustained if the evidence furnishes the basis for two equally permissible conclusions as to what caused the injury, one of which speaks negligence on the part of the defendant, while the other is wholly inconsistent with it, and points to some other efficient proximate cause. This court has repeatedly so held."

Scheytt v. Gallatin Valley Milling Co. 54 Mont. 565 at 572.

"And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee

> is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Patton v. Texas & P. R. Co. 179 U. S. 364.

The plaintiff offered proof to show that defendant and its agents entered upon the land described in the oil and gas lease, built roads thereon, built a power plant thereon for the purpose of pumping oil and water, erected tanks thereon for storing oil, laid pipe lines for carrying oil and water, and erected a telephone line thereon to be used in connection with the operations of the defendant, but plaintiff failed to prove by competent evidence, or otherwise, that these acts caused any damage other than the opening of the fences, which opening of fences allowed range stock to enter upon the premises and destroy the growing crops. The evidence introduced by plaintiff herein, if sufficient to prove damages at all, and plaintiff in error denies that it is, limits the recovery of plaintiff to damages done to his fences and damages done to his growing crops. There is no evidence in the record to show that the *lands of plaintiff have been permanently injured, or otherwise injured,* so that said lands of

plaintiff are of less value to the plaintiff, for which said lands were being used by plaintiff, but on the contrary the plaintiff testified as follows: (Tr. 62)

> "The reason I left my place in the fall of 1920 was that I sold off my cattle and chickens, because I couldn't keep my place and operate it, because the fences were torn down and kept torn down, and I tried all summer to keep them up, and I sold my stuff until further operations, until they either got out of there so that I could start in again and start in new if they didn't make a success."

Under the evidence introduced on behalf of plaintiff in the case, and under the pleadings in the case, the trial court erred in permitting evidence to be introduced showing the value of the land before the entry by defendant and the value of the land after the entry by defendant.

> "The difference in the value of land before and after the trespass is the general rule as to the measure of damages for an injury to the land itself, and this means the difference in value of the entire tract, not merely the ground at the exact place of injury. But where the land can be restored to its former condition, at a cost less than the diminution in value, if it is not restored, the cost of restoration, plus

compensation for loss of use, is frequently laid down as the measurement of damage, however, the application of this principle is confined to cases where the cost of restoration is less than the difference in the value of the land before and after the trespass, and of course it is limited to cases where cost of restoring the specific land is less than the value of the land. Evidence of cost of restoration is admissable only to reduce, not to increase, the damages above the diminution in value of the land resulting from the trespass."

38 Cyc. pages 1126-1127;
Eby v. City of Lewistown, 55 Mont. 113, 173 Pac. 1163.

"Where a thing growing on and a part of the realty has a distinct value, such as growing grass, recovery must be for the value of the thing destroyed, and not the difference between the value of the real estate before and after the destruction."

Marron v. Great Northern Railway Company, 46 Mont. 593, 129 Pac. 1055.

"No recovery can be had for merely remote or speculative damages. Damages are given as compensation, recompense or satisfaction to plaintiff for the injury actually received by him from defendant,

and they must be the natural and proximate consequence of the act complained of."

38 Cyc. 1138.

As hereinbefore recited, there is no evidence in the record to prove that the *land of the plaintiff was injured, or that the turf of the pasture lands or meadow lands was injured.* For this reason the trial Court erred in permitting evidence to be introduced showing the value of the land before the entry by defendant, and the value of the land after the entry by defendant.

It is a rule of law that "if the thing destroyed, although it is a part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, not the difference in the value of the land before and after such destruction."

Atlantic & B. Air Line Ry. Co. v. Brown, 158 Ala. 607, 48 South, 73; 4 Sutherland on Damages, 3d ed., 1023, 1049;
St. Louis Etc. R. Co. v. Noland, 75 Kan. 691, 90 Pac. 273.

The plaintiff testified as follows: (Tr. 61)

"In 1920 practically no injury was done to the meadow lands because the fence was kept up until after the first crop."

If this be true, and the plaintiff should know the facts if anyone does, then the damages suffered by plaintiff, according to his own testimony, is the damages to his fences and damages for loss of pasture and crops. The plaintiff testified (Tr. 44 and 59-60) that his damage for loss of pasture is $150.00 a year for the years 1921 and 1922. As to proof of the damages to fences, plaintiff testified: (Tr. 39-40)

> "In 1920 I rebuilt the fence and worked practically all summer running stock and building fences. * * * In the spring of 1920 I put in a full and complete new fence, about 60 rods by the coulee, where all the wire and posts were gone. I put that in the second time. The reasonable value for the materials and work that I performed there in making those repairs varies; the wire, I think I paid $5.50 for the spools, and posts, and then my time. My time all that summer was in that line of work. It ought to be worth $100.00 a month, the way the wages were then, for my time, besides the materials. I started in about the first of March, 1920, and put in my time at that work up to September."

As to the fences plaintiff further testified: (Tr. 42)

> "Along about March, 1921, I went down on that piece of forty and fixed up the fence and drove the stock out. That spring I repaired the fence all around the place, all around this forty acres. I was about three days, there on the first time, and drove the stock all out, and fixed up the fence. I had to furnish posts and wire to repair it. I should judge the reasonable value of my time and the materials furnished for that purpose was twenty or twenty-five dollars."

As to the fences the plaintiff further testified: (Tr. 53)

> "In my judgment it would cost about $60.00 a quarter for the red cedar posts and four galvanized wire, to replace the fences that have been torn down in connection with the operations of the Frantz Corporation. I had three quarters on the north, two on the west, one on the south and then on the east and south; this cross-fence here, a quarter, and then one in and around, and a line fence I described a few minutes ago, and one crossing the river."

If this testimony be true, then the cost of rebuilding all of the fence would not exceed the sum of $600.00, as there were ten quarters, according to the testimony of the plaintiff.

Under any possible theory of the case the maximum amount of damages proven by plaintiff is the sum of $600.00 for destruction of fences, which amount is the sum that it would cost the plaintiff under his own testimony to rebuild his fences in the event that the oil estate should cease, and he desired to renew his former operations thereon as indicated by his testimony.

As to the damages for the 1921 and 1922 crops, the following evidence was introduced by plaintiff: (Tr. 60)

> "I left the place and moved to Lewistown late in the fall of 1920. In 1921 I did not cut any at all, and in 1922 I wasn't there."

> (Tr. 44) "In 1921 I don't know what the market value of the hay was in that vicinity. I don't know what the market value of blue joint was in the fall of 1922. I wasn't right in that locality."

The evidence of the plaintiff with reference to the amount of the crops and the value of the crops for the years 1921 and 1922 is uncertain and remote, as the record discloses. Al Dixon, a witness for the plaintiff, testified: (Tr. 64-65)

> "I paid no particular attention to them in the year 1920. I don't know what the general conditions in that vicinity were in the summer of 1921. I wasn't there. I

returned to that country about the middle of February, 1922."

This witness, Al Dixon, testified (Tr. 65) "that the sweet clover would go a ton and a half to the acre in 1922."

Objection was made by attorney Marshall on the grounds that there is no evidence to show it was in sweet clover in 1922, and in answer to the objection attorney Ford, representing the plaintiff, stated: "No, there was no crop."

Surely evidence of this character is of very little value to prove the amount of the crops or the value thereof. There is no proof in the record to show the costs of raising, harvesting and caring for the crops of plaintiff, and this is an essential factor in arriving at the damage. It is true that there is testimony in the record to show an estimated cost of $2.00 per ton to cut and harvest the hay, and an estimate of $50.00 a year to irrigate the lands, but this evidence is uncertain and remote, and not sufficient to come within the law.

> "Damages based upon the value of unmatured crops are analagous to profits lost, and are governed by the same rule precluding recovery in cases or either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determin with reasonable

certainty the probable value it would have had if matured. The cultivation of similar crops or portions of the same on adjoining lands, under similar conditions, may furnish data sufficient to remove the uncertainty as to damage to an unmatured crop."

17 Corpus Juris, page 785;
Rass v. Sharp, 46 Mont. 474, 128 Pac. 594;
Shotwell v. Doseye, 8 Wash. 337, 36 Pac. 254.

From the pleadings and evidence in this case it is evidently the theory of the plaintiff that "defendant took possession of the property and ousted plaintiff therefrom." Plaintiff in error does not subscribe to this theory. If this is the theory of the plaintiff in the case, then plaintiff is not entitled to recover damages herein, as there is an entire failure of proof to warrant recovery, and the trial court erred in permitting evidence of and informing the jury to the effect that the difference in the value of the land before the entry and the value of the land after the entry was the rule of damage, for the reason that under this theory the rule of damage is the value of the use of the property.

38 Cyc. 1127-1129;
Sec. 8687 Mont. Revised Codes.

The foregoing covers practically all of the Assignments of Error and to some extent those that are not directly mentioned. However, we do not want to waive the Assignment of Error III, g, for the reason that we believe the lessee was entitled to show that whatever hauling was done for the purpose of its camp was done by independent contractors. As a matter of fact its supplies and materials for the permanent camp of the company, to wit, the camp on the Charles tract was done by independent hauling on a per pound basis, practically the same as that of a railroad, so that the use of the roadway was by some one other than the lessee corporation yet we were not permitted to show this. While it was true that it was used for its benefit at the same time it was no part of its operations but was a continuation of its freight hauling from the railroad to the camp. We believe we were entitled to show this, not only in mitigation of damages, but also to show that there was a confusion of causes which brought about any damage which may be claimed by reason of the roads or their use. Bringing the case within the rule in Shaw v. New Year Gold Mines case and also proper under a general denial.

Upon Assignment III, j, which has to do with the question asked of expert Sonntag as to the reasonable value of similar lands for like purposes and use we believe the court was distinctly in error in refusing to permit testimony in light of plaintiff's theory of the case, which we do not consent is the

correct one. This evidence was clearly admissable in mitigation of damages.

As to the error assigned upon the court's instructions, we have practically covered this in the foregoing argument, wherein we have attempted to show this court that the lower court had an entirely wrong theory and erroneous impression of this contract, its intent, its force, and its effect. Following out its theory the court instructed the jury peremptorily that they should allow damages in such amount as they would fix for these elements which we believe were entirely incident to the lease, or damnum absque injuria. We also believe that the court's instruction was erroneous upon the question of the measure of damage to these lands under the rule in Montana.

This appeal is a most important and serious one of the oil industry. If an oil lease can be given which clearly contemplates structures upon the land, that contains no reservations whatever to the lessor, that must carry the incidents of right of ingress and egress, and then after it has been acted upon and used, oil discovered and an estate vested and recognized as an estate in the land, the lessee can be held up in damages for damages to the surface that was not reserved and given no indications of reservation, oil leases may become valueless and oil land development may be greatly retarded and diminished in Montana.

With the possible exception of the fences there is not one iota of damages proven in this case that was not entirely within the lease, or incident to its use, and within the contemplation of the parties and the laws of construction of the contract. As to the fence, granted that recovery might be had for it which we do not concede because we did not destroy them, the maximum of proof is $600.00 damages. With the jury finding a verdict for $3,-500.00, it is quite apparent that the admission by the court of the evidence on the other claimed damages prejudiced the jury and brought about a verdict far in excess of that which the evidence would sustain.

We respectfully submit this cause should be reversed and new trial ordered.

Respectfully submitted,

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Plaintiff in Error.